

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTOINE STRATTON, on behalf of)	
himself and all others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 08C-12-012 JRS
)	
AMERICAN INDEPENDENT)	
INSURANCE COMPANY,)	Complex Commercial
)	Litigation Division
)	
Defendant.)	

Date Submitted: May 24, 2011
Date Decided: August 12, 2011

Upon Consideration of Defendant’s Motion for Reargument and for Clarification
DENIED.

ORDER

This 12th day of August 2011, Defendant American Independent Insurance Company (“AIIC”), having moved for reargument and for clarification of this Court’s decision denying its Motion to Dismiss Plaintiff’s proposed class action complaint for lack of standing (the “Opinion”),¹ it appears to the Court that:

¹*Stratton v. Am. Indep. Ins. Co.*, 2011 WL 2083933 (Del. Super. May 11, 2011).

1. On May 11, 2011, the Court denied AIIC’s Motion to Dismiss Stratton’s complaint for lack of standing, holding that AIIC attempted to “pick off” Stratton’s class action claim by causing Stratton to settle his individual claim without the knowledge and consent of his attorney.² Because he was picked off and, further, because he maintains an interest in this class action litigation, the Court concluded that Stratton retained standing to continue as the class representative, at least until the issue of class certification is addressed.³ AIIC has moved for reargument of the Court’s denial of the motion to dismiss for lack of standing and for clarification of the Court’s determination that Stratton’s personal claim for recovery is moot. AIIC further seeks an amendment to the Opinion to reference that, notwithstanding the “pick off” issue, the “exhaustion-related” discovery and briefing may reveal that Stratton lacks standing to represent the proposed class.

2. “A motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal. . . .”⁴ “[The motion] will be denied unless the Court

²*Id.* at *1.

³*Id.* at *8.

⁴*Hessler Inc. v. Farrell*, 269 A.2d 701, 702 (Del. 1969).

has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision.”⁵

3. AIIC first asks the Court to reconsider its decision to deny AIIC’s motion to dismiss Stratton’s proposed class action complaint for lack of standing. In support, AIIC argues that the “Court misapprehended facts such as would have changed the outcome, and did not ultimately give sufficient weight to facts marshaled in support of and to the merits of AIIC’s arguments.”⁶ Specifically, AIIC contends: (1) the Court did not give sufficient weight to AIIC’s assertion that it did not pursue recovery of the deductible until after the litigation was filed; (2) the Court did not give sufficient weight to the evidence that Stratton’s attorney had notice of Stratton’s receipt of the AIIC settlement check; (3) the Court misapprehended the facts by deciding that AIIC did not provide a meaningful explanation to Stratton of the purpose of the check or the consequences of cashing it; and (4) that the evidence does not reveal an intent to “buy Stratton off.”⁷ The Court will address AIIC’s arguments

⁵*Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett, Co.*, 2003 WL 1579170, *1 (Del. Super. Jan. 17, 2003).

⁶AIIC’s Mot. Reargument and Clarification (Def.’s Mot.) at 3 (citing *Lamourine v. Mazda Motor of Am.*, 2007 WL 3379048 (Del. Super. Sept. 24, 2007); *Merendino v. Kupcha*, 2002 WL 32067546 (Del. Super. Dec. 30, 2002)).

⁷Def.’s Mot. at 8.

in turn.

4. While the Court considered AIIC's claim that it did not wait to pursue Stratton's deductible until after litigation was initiated, the record before the Court told a different story. Soo Kim, AIIC's subrogation manager during the relevant time period, testified in deposition that, although AIIC determined that Stratton's deductible should be pursued, no such action was taken to recover Stratton's deductible until after the filing of the class action lawsuit.⁸ As explained thoroughly in the Opinion, the Court was further alerted to a "pick off" by the manner in which the check to Stratton was transmitted. AIIC was fully aware of the pending litigation yet chose to bypass Stratton's attorney and send the check directly to Stratton. Moreover, the check was mailed without a cover letter or other explanation of the purpose of the check or the repercussions of cashing it.⁹ Upon reviewing all of the facts, the Court remains satisfied that AIIC attempted to "pick off" Stratton's claim.

5. AIIC contends that the Court overlooked evidence that Stratton notified his counsel of his receipt of the check and that Stratton's counsel had notice that the check would be sent directly to Stratton. What AIIC fails to appreciate, however, is that the evidence supports the conclusion that Stratton notified his counsel of the

⁸Kim Dep. Tr. at 145 ("[O]nce the lawsuit was filed, [Stratton's] file came to our attention."); *See Stratton*, 2011 WL 2083933 at *6.

⁹Kim Dep. Tr. at 31-52.

check only after the damage was done (after he cashed the check), thereby depriving Stratton of a knowing and voluntary settlement of his claim with the benefit of legal counsel.¹⁰ As the Opinion details, AIIC's effort to thwart Stratton's ability to enter into a knowing and voluntary settlement with the benefit of counsel is precisely why the Court found, and continues to maintain, that Stratton was "picked off."¹¹ Moreover, the record before the Court supports the conclusion that Stratton's counsel could reasonably expect that any payment to Stratton be transmitted through counsel.¹² At best, the reasonableness of Stratton's counsel's expectation that a settlement check be transmitted through him is a factual issue not susceptible of summary disposition.

6. AIIC's argument that the Court erred by finding that AIIC failed to provide a meaningful explanation to Stratton of the purpose of the check or the consequences of cashing it is not persuasive. Stratton, his particular level of sophistication aside, is a lay person. The "2006-51660/70% DED" reference on the check's face, and the "personal injury protection" reference on its stub, were not sufficient to apprise Stratton that the check was intended as consideration for a full

¹⁰Stratton Dep. Tr. at 28.

¹¹*Stratton*, 2011 WL 2083933 at *6. *See also Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992).

¹²*See Kim Dep. Tr. at 182.*

and final settlement of all claims against AIIC, including his class claims.¹³ As the Court previously noted, AIIC’s failure to send the check with some meaningful explanation of the purpose of the check and the repercussions of cashing it was but one fact the Court considered among several others, the totality of which led to the finding of a “pick off” of Stratton’s class claims.

7. As to AIIC’s final basis for reargument, the Court made clear that “[i]t is undisputed that AIIC did not employ an offer of judgment to force a settlement upon Stratton. The coercive elements of the offer of judgment, therefore, are not in play here.”¹⁴ The Court went on to explain, however, that “a class action defendant need not rely exclusively on the offer of judgment as the means to coerce an unwitting class plaintiff into folding his cards prior to class certification. Other tactics can achieve the same result.”¹⁵ As the Opinion details, the holding in *Lusardi* prompted “the Court to look carefully at the circumstances surrounding Stratton’s purported settlement with AIIC to determine if the settlement was, in fact, knowing and voluntary.”¹⁶ The Court remains satisfied that the evidence demonstrates that

¹³*Stratton*, 2011 WL 2083933 at *6.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.* See also *Lusardi* 975 F.2d at 968 (noting that plaintiff had settled his claim following “lengthy settlement negotiations” and pursuant to a detailed “memorandum of understanding” which resulted in a “full and unconditional release” of the individual claims).

Stratton’s claim was “picked off” by AIIC for the reasons fully articulated both above and in the Opinion.

8. AIIC also seeks clarification of the Court’s determination that Stratton’s personal claim for recovery is moot. While Stratton’s individual claim for his deductible is moot because he has received all that he is entitled to receive under his subrogation claim, the Opinion makes clear that Stratton “seeks not only the receipt of his deductible, but also a declaration that AIIC must in the future conduct reasonably prompt and good-faith evaluations of its obligation to recover PIP deductibles for all of its Delaware PIP insureds in a manner consistent with Title 21, Section 2118 of the Delaware Code.”¹⁷ The Court further explained that Stratton’s allegations may be capable of repetition but would, upon dismissal, evade review.¹⁸ Accordingly, the Court concluded that Stratton retained a sufficient personal stake in the litigation to move to the next phase of the proceedings, despite the mootness of his individual claim. The Court remains satisfied that this holding was well founded.

9. Finally, AIIC asks the Court to amend its decision to recognize that the

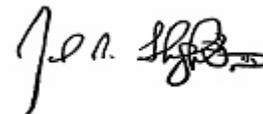
¹⁷*Id.* at *8; *See* Am. Compl. ¶44.

¹⁸*Stratton*, 2011 WL 2083933 at *8. *See also Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 824 n.5 (Del. 1997) (“Two recognized exceptions to [the] mootness doctrine are situations that are capable of repetition but evade review and matters of public importance.”); *Hoban*, 2004 WL 2610543, at *5 (“[T]here are serious questions as to whether this dispute is capable of repetition but evading review.”).

“exhaustion-related” discovery and related briefing may uncover evidence that would constitute additional grounds to deprive Stratton of standing to represent the proposed class. The amendment AIIC seeks is unnecessary. The Opinion addressed the narrow issue of whether Stratton’s claim was moot by virtue of his receipt of all that he was entitled to receive under his subrogation claim or whether his status as the class representative was saved by virtue of a “pick off.” Should AIIC discover information that leads it to believe that Stratton is relieved of standing based on the exhaustion issue, it is free to file the appropriate motion. Indeed, it is the Court’s understanding that the parties intend to address the “exhaustion” issue with the Court shortly.

10. Based on the foregoing, AIIC’s Motion for Reargument and for Clarification is **DENIED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "J. R. Slights, III". The signature is written in a cursive, somewhat stylized font.

Judge Joseph R. Slights, III